



April 2014

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Igor Grazin

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## Recommended Citation

Igor Grazin, *International Recognition of National Rights: The Baltic States' Case*, 66 Notre Dame L. Rev. 1431 (1991).  
Available at: <http://scholarship.law.nd.edu/ndlr/vol66/iss5/10>

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# The International Recognition of National Rights: The Baltic States' Case

Igor Grazin\*

## INTRODUCTION

Inherent in an international law of recognition is the right to be recognized according to international law as well as to be recognized by the world community. Initially, there is no need to name all the possible and potential subjects of international law ranging from private individuals to states. It is enough to begin with the statement that "nations," whatever this word may mean in international law, are included among these subjects.

The legal relations between nations tend to have different frameworks which are in some way connected to the social organization of the individual states. The relationship between two unitary nation-states (*e.g.*, France and Italy, France and Germany, Germany and Hungary) is the simplest example, though not always simple in political and legal practice. These relations create a specific set of problems concerning the legal status of ethnic minorities. To a considerable extent, the minorities in such nation-states are really minorities, and their rights are determined by internal or municipal law and reflect the political goals and the nature of the political regime of a given state. The political and cultural rights of Swedes on the Åland islands (though once a matter of international concern) are determined by the internal laws of Finland. The rights of ethnic and native Indians in North America have been the internal affair of Canada and the United States. Nonetheless, in the post-World War II period, one cannot say that these types of relations between ethnic and national minorities and majorities are irrelevant in international law. Two

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\* Visiting Professor of Law, University of Notre Dame, and Professor of Law, Estonia Academy of Sciences. Law Degree, Tartu University Law School; Ph.D. in Law, All-Union Institute of Law, Doctor of Law, Institute of Law and State, Moscow; member of the Supreme Soviet of the Soviet Union in 1989-90.

I express my gratitude to Professors William Lewers, C.S.C. and John Atanasio, who in the fall of 1990 arranged a semester-long faculty seminar at the University of Notre Dame on the legal problems of perestroika in the U.S.S.R. Several ideas in this Article arose from that forum.

basic documents on human rights and the appearance of international human rights law itself provide certain international guarantees for such minorities in nation-states.

The international dimension of the rights of ethnic minorities also appears in connection with another situation: an ethnic minority disapproves of the nation-state in which it resides while that ethnic group is simultaneously the majority of some other state, and this other nation-state appears concerned with the ethnic minority's situation in the other nation-state. For example, the same group of Swedes on Åland is not only a specific ethnic minority in Finland, but it is also a society that has a specific cultural, ethnic, and sometimes even political relationship with another nation-state, Sweden. In the Åland case, all of the problems arising from this situation were resolved in a friendly manner. The Cyprus situation, however, illustrates the converse result where the relationship of two ethnic groups to their ethnic motherlands has caused permanent political and legal tension. This type of relationship has caused very dangerous situations in history and has served as a pretext for naked aggression. One example of this aggression is the occupation of part of Czechoslovakia by Hitler during World War II under the pretext of protecting the Sudenten-German minority. The opposite example in our day is the Polish-Lithuanian relations, in which the rights of the Polish minority in Lithuania have been negotiated by the governments of these two states.

A third category of ethnic relations relevant for international legal analysis is the category arising out of the appearance or restoration of nation-states which have ceased to exist as a result of different circumstances, most notably due to circumstances within the scope of international legal regulations. In fact, the phenomenon of "terra nullius" no longer exists. No longer is there a procedure for the realization of national rights through the creation or restoration of a nation-state. A process of acquiring legal rights by restoration inevitably influences the set of legal rights and political interests of the states that are already members of the world community. Now international law and the existing world order have to meet a serious challenge: whether to preserve themselves untouched at the price of negating certain rights of some nations, or to accept general political and legal principles that may change the political map in the course of a renaissance of nations that are not members of the world community today.

This challenge may create antagonism between international legality and political pragmatism. But I sincerely believe that, in

the long run, the preservation of the principles of international law may also bring pragmatic dividends. One question remains: What are the international rights of ethnic minorities who have expressed their will to obtain, or, as it was recently in the Baltics, to restore, their statehood and who today are a part of some other unitary or federal state?

This Article will discuss this question in reference to the status of the Baltic states as it was prior to August 18, 1991. The Baltic states' case, although happily resolved with Lithuania, Latvia, and Estonia once again recognized members of the family of independent states, provides a source for a valuable lesson. The legal aspect of the Baltic states' recent struggle for freedom discloses certain problems within international law that deserve academic discussion and whose solution should be of some political and international legal value. The main thesis of this Article may be summed up in one sentence. The right of self-determination, while not an ethnic right, protects the interests of an ethnic minority when and if it is raised to the level of political claims. Part I studies theories concerning ethnic rights and self-determination, and Part II is devoted to the case study and tries to reveal the political and legal dimensions of valid claims for self-determination.

## I. THE PROTECTION OF ETHNIC RIGHTS AND NATIONAL SELF-DETERMINATION

Generally, it has been accepted that there are no binding rules in international law that create an obligation for an existing state to recognize the appearance of a new state. Hersch Lauterpacht stated: "The principal feature of the prevalent doctrine of recognition of States is the assertion that recognition is, in its essential aspect, namely, in relation to the community claiming it, an act of policy as distinguished from the fulfillment of a legal duty."<sup>1</sup> On the contrary, recognition that may be considered premature may be qualified as a "tortious act against the lawful government; it is a breach of international law."<sup>2</sup> A typical example of this is the immediate recognition by an aggressor of a puppet regime which it created. Historical examples of this include the recognition of the puppet Kuusinen government in Finland by

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1 H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 7 (1947).

2 *Id.* at 95.

Stalin and the newborn fascist Slovak state by Hitler during World War II.

This legal idea is based on the assumption that the former state is opposed to the appearance of the new one, and the creation of the new state contradicts the former state's political and legal intent. Unfortunately, this is often the case and not only in such extreme cases as mentioned above. History provides us with many examples in which the appearance of a new state whose population constituted the former ethnic minority contradicted the will of the former home-state. The Russian, Austro-Hungarian, and Ottoman Empires, dismembered under the strong political and military pressure of World War I, gave birth to many new states in Europe including Greece, Poland, Yugoslavia, Finland, and the Baltic states to mention only a few. The United States also, though not ethnically unified as a nation, did not ask permission of Great Britain to create a new state.

The lack of a binding rule creating an obligation of recognition (of an ethnic group, a state) is not a symmetric phenomenon. In other words, though the former state has no duty to recognize, the national or ethnic group, nonetheless, does have the right to exercise its expression of will to "determine" itself under the rules of international law. International law has accepted that a national group or ethnic community may claim its will for self-determination. Nonetheless, this does not create a duty for the already existing members of the world community to accept this claim.

This inconsistency raises at least two questions: (1) who constitutes the group that has the internationally-tolerated right of self-determination, and (2) in what form do such claims have to be presented in order to be valid with respect to international law?

According to the texts of international law, the right of self-determination belongs to the peoples<sup>3</sup> or to the nations. The latter may be derived from the fact that the Declaration on

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3 See *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970), reprinted in 9 I.L.M. 1292 [hereinafter *Declaration on Friendly Relations*]; *International Covenant on Civil and Political Rights*, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force, Mar. 23, 1976); *International Covenant on Economic, Social, and Cultural Rights*, opened for signature, Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force, Jan. 3, 1976); *Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960*, art. 2, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961) [hereinafter *Declaration on Decolonization*].

Friendly Relations simultaneously protects both the rights of people and the "national unity and territorial Integrity" of states and countries.<sup>4</sup> The connection between peoples' and national claims for self-determination can also be found in the chapter of the Declaration on Friendly Relations entitled "The Principle of Equal Rights and Self-Determination of Peoples." It states: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."<sup>5</sup>

Therefore, the right of self-determination is provided to the peoples, specifically, dominantly ethnic unities, but the claim itself—the "establishment of a sovereign and independent State,"—is of a political and national character.<sup>6</sup> National self-determination and the peoples' right of self-determination are thus, to some extent, equal and synonymous.

This thesis requires further comment. First, while these notions coexist, they are not identical. As Johannes Mattern noted in 1928, these notions historically were interpreted differently.<sup>7</sup> Using the constitutional documents of the French Revolution as a base, he argues that the principal difference between them is that if the "nation" means the people, "not as a social, but as a political organism," or people as a state, then popular sovereignty, or the sovereignty of people, refers to the right to execute political power without any delegation of it to other political structures.<sup>8</sup>

Second, the above-mentioned distinction, though valid today, does not exhaust all of the possible meanings of "nation." Besides this political meaning, the distinction also accepts the ethnic quality of the term. Some provisions of the Universal Declaration of Human Rights<sup>9</sup> and the International Covenant on Economic, Social, and Cultural Rights<sup>10</sup> are also evidently aimed at the protection of purely ethnic national rights. This interpretation may be found in some regional documents of international law. For in-

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4 *Declaration on Friendly Relations*, *supra* note 3, at 122.

5 *Id.* at 124.

6 *Id.*

7 J. MATTERN, CONCEPTS OF STATE, SOVEREIGNTY AND INTERNATIONAL LAW 27-30 (1928).

8 *Id.*

9 G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

10 *Supra* note 3.

stance, the African Charter on Human and Peoples' Rights<sup>11</sup> specifies in article 20 the peoples' right to existence,<sup>12</sup> and in article 22 their right to "economic, social and cultural development with due regard to their . . . identity."<sup>13</sup>

Therefore, although the notion of "nationality" does not refer solely to ethnic groups and is not exhausted by the forms of political organization of a given group, the peoples' right of self-determination is, nevertheless, one method of protecting the rights of ethnic minorities. Using Mattern's terminology, the ethnic majority, formerly the minority, is protected through its becoming a nation.

Both in theory and in fact, the group that utilizes its right of self-determination may not be ethnically homogeneous at all. Because a nation is formed on a political rather than on an ethnic basis, it follows that self-determination in the form of obtaining or restoring statehood is not entirely an ethnic act. Although, in fact, the lead in a political movement for obtaining or restoring statehood may be grasped by a dominant ethnic group that is a minority in relation to the State population, this does not change the nature of the right from a national one to an ethnic one. This fact has sometimes been overemphasized for propagandistic reasons. The national movements in the Baltic states—officially called *popular* fronts—have been presented by Soviet propaganda not as national movements in the international legal sense of the word, but as ethnically nationalistic. But Helene Carrere D'Encausse writes:

The nation in Europe, even in Eastern Europe, is not tribal; the passionate desire to consolidate the nation within the framework of the state does not imply any slippage toward tribalism. The attachment to the nation, to the larger community, cemented by territorial proximity and a common past, endowed with accepted structures, is the accomplishment of civilized man. It is an advancement over primitive society, not a regression toward it.<sup>14</sup>

In spite of subjective motives and other secondary circumstances, the national movement towards the realization of the right of self-

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11 June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 I.L.M. 59 (entered into force, Oct. 21, 1986).

12 *Id.* at art. 20.

13 *Id.* at art. 22.

14 D'Encausse, *Springtime of Nations*, THE NEW REPUBLIC 22, Jan. 21, 1991.

determination should not be ethnic in nature if it wants to be recognized by international law.

If the "self" in the self-determination is ethnically divergent, though still an ethnically dominant minority in itself, it becomes especially complicated to determine the scope of a group to which this right of self-determination may really belong. In his classic work, *Secession*, Lee S. Buchheit puts forward two main criteria for the group: (1) The subjective self-perception of the group needs to be distinct from the others; and (2) the group must have objective characteristics which distinguish it from the ambient population.<sup>15</sup> Examples of such characteristics include "elements of a religious, historic, geographic, ethnologic, economic, linguistic, and racial character."<sup>16</sup> At the same time, it is evident that these criteria, even when present, are not "sufficient" by themselves. Moreover, the inability to meet both of these criteria sometimes has not been an obstacle to self-determination. The United States at the end of the 18th century, for example, met only one objective criteria, geography, necessary for it to secede from the British Empire and to self-determine. Nonetheless, it did secede. At the same time, the almost total identity of Swiss Germans does not grant them a right to secede that can be admitted by international law.

These circumstances may well imply an agnostic point of view such as Buchheit's. "The international jurist can act only as historian, chronicling instances of valid claims to self-determination after they succeed but unable to offer an opinion concerning their legitimacy before they reach, or fail to reach, fruition."<sup>17</sup>

#### A. *The Recognition of the Scope of Claims*

Although it is almost impossible to determine the "self" aspect in self-determination, additional criteria make the acceptance of these claims more probable.

The first criteria is the political character of such claims. Considering purely ethnic rights (the preservation of culture, religion, language), the internationally accepted rule does not imply that ethnic authorities have the right to create their own, new nation-states. This precedent can be seen in the *Western Sahara*<sup>18</sup> case, in

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15 L. BUCHHEIT, *SECESSION* 9-11 (1978).

16 *Id.*

17 *Id.* at 45.

18 *Western Sahara* (Advisory Opinion), 1975 I.C.J. 12.



which the International Court of Justice held that the right of self-determination does not inevitably imply the creation of a new state. On the contrary, the advisory opinion stated that the General Assembly of the United Nations retained "a measure of discretion with respect to the forms . . . by which that right is to be realized."<sup>19</sup>

The settlement of the previously mentioned Åland islands question in 1921 exemplifies the case in which ethnic rights were still protected even though no evident claims for the creation of a new state were asserted. The International Commission of Jurists acting on the behalf of the League of Nations decided in favor of Finland's sovereignty over this territory, but at the same time, provided the Swedish population the guaranteed right to preserve its language, national way of life, and other rights.<sup>20</sup> The report presented to the Council of the League of Nations stated:

To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life. It would be to uphold a theory incompatible with the very ideas of the State as a territorial and political unity.<sup>21</sup>

Combining the advisory opinion in the *Western Sahara* case and the current policy of the United Nations, this cannot be considered a binding rule of international law. Instead, these documents state the political practice or preference that purely ethnic rights of national groups are not considered to be the exhaustive foundation for self-determination to the extent of claiming the right to create an independent state. Rather, the rights of ethnic groups are protected through the administration of certain individual human rights such as the right to education, to proper medical treatment, to free exercise of religion, etc. Some exceptional decisions concerning the preservation of certain cultures and ways of life made by specialized international institutions do not undermine this general principle. The International Labor Organization (ILO) preservation of tribal or semi-tribal nations is one example.

Two ILO documents concerning the rights of tribal and semi-tribal peoples in independent states show the protection of purely

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19 *Id.* at para. 7.

20 See HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION 38 (1990).

21 *Id.* at 30.

ethnic rights.<sup>22</sup> The documents dealing with the rights of ethnic, social, and socio-ethnic character provide protection to the ethnic identity of mentioned social groups and protect their members against social and economic discrimination. The documents do not, however, derive any direct political or "self-determinational" consequences from the necessity of providing such protection. It is important to note that these specialized documents are aimed at protecting peoples of a "less advanced stage" of development and even, as such, may be interpreted in a fairly restricted way.<sup>23</sup> The same may be said of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>24</sup>

The statement closest to relating ethnic rights to the right of self-determination is article 1 of the U.N.'s Declaration of the Right to Development.<sup>25</sup> Article 1 states: "The human right to development also implies the full realization of the right of peoples to self-determination, which includes . . . the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."<sup>26</sup>

This "full sovereignty" may be understood as statehood or any other political entity, but the clause considering "natural wealth" and "resources" implies the protection of natural items that constitute part of the ethnic-cultural environment of a given socio-ethnic group, such as hunting and pasture-land for nomadic people, or wood areas for gatherers. Therefore, the existence of a state organization does not constitute the *conditio sine qua non* for popular development under the logic of this Act.

Accordingly, the need to protect certain ethnic interests is considered to be one reason to exercise the right of self-determination. This interest, however, is internationally accepted as a

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22 See International Labor Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, *opened for signature* June 27, 1989, 72 INT'L LAB. OFF. OFFICIAL BULL. 59 (Ser. A, No. 2), *reprinted in* 28 I.L.M. 1382; International Labor Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247 (*entered into force*, June 2, 1959) [hereinafter Convention No. 107].

23 Convention No. 107, *supra* note 22, at art. 1(a).

24 G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981), *reprinted in* 21 I.L.M. 205.

25 G.A. Res. 41/128, 41 U.N. GAOR Supp. (No. 53) at 21, U.N. Doc. A/41/925 (1986).

26 *Id.* at art. 1.

justifiable foundation for such an exercise if, and only if, other justifying elements are also present. As stated earlier, "nation," in the modern understanding of the word, means a "politically organized society."<sup>27</sup> This doctrinal position can also be found in some modern international documents which are accepted as legally significant for international law.

The extent to which the Palestine Liberation Organization (PLO) is accepted as a sole representative of the Palestinian people is irrelevant, especially after the political failure of Yasir Arafat in the Gulf War of 1991. Nonetheless, the PLO has observer's status in the United Nations, making the PLO's position a potential subject in international law. Article 6 of the Palestinian National Charter of 1968 states that "the Jews who had normally resided in Palestine until the beginning of Zionist invasion will be considered Palestinians."<sup>28</sup> This confirms once again the political character of the national unification. The right of self-determination, at least to the extent of obtaining or restoring statehood as a means of protecting ethnic interests, is not derived directly from these interests, nor is the right determined by them. On the contrary, the right of self-determination may be executed only if national or political justifications also support such an exercise.

As mentioned above, "self-hood" or being a "self," has both objective and subjective aspects. Correspondingly, a social group determining itself must possess not only ethnic, but also political self-consciousness. This dual aspect of "self-hood" means that the social group must have not only organizational forms of ethnic self-consciousness like ethnic, cultural organizations, linguistic clubs, but also political units such as political parties, newspapers, and declarations. A group must also have objective grounds for expressing political diversity. In a purely speculative and non-exhaustive way, three possible justifying items are: (1) Political diversity manifested in the nonacceptance by the national minority of a political regime or the constitutional forms of the dominant state; (2) the deprivation of the right to political autonomy, or certain elements of independent statehood (or at least of considerable self-governance); or (3) the failure of the dominant state to recognize the former or independent state. Regardless of how this

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27 See *supra* note 7 and accompanying text.

28 PALESTINE NATIONAL CHARTER OF 1968, *reprinted in* 3 THE ARAB-ISRAELI CONFLICT 706 (J. Moore ed. 1974).

autonomy or statehood was lost, it is enough that some elements of it still remain in existence today.

### *B. Embryonic Statehood*

The elements that remain after statehood or autonomy is lost may manifest themselves in many ways. They may take form in the federal composition of the dominant state. For example, the subjects of federalism may preserve some elements of statehood and not be merely units of administrative territorial composition. The elements also may take the form of special political entities such as protected territories, demilitarized zones, colonial or occupied territories, or in specific forms of national representation like governments in exile or PLO-type organizations.

These elements are not a complete solution to the problem posed by Buchheit that the criteria for determining the right of national self-determination are vague, but at least they do aid the determination in a broad sense. This Article asserts not only that ethnic self-consciousness and objective ethnic criteria are necessary, but that the political dimensions of both are also important for an ethnic minority's right of self-determination to be recognized by the other subjects of international law. Better protection of the rights of a given ethnic minority is not achieved by itself, but is a kind of by-product of political self-determination.

I am unable to produce an example of the first political criterion—the distinction of political regimes and of constitutional forms—in the post-colonial period of the twentieth century. But a good example from earlier history is the United States' Declaration of Independence. This document typifies full scale political collision. The political interests of Britain and the American colonies differed greatly, as did their economic strategies and their understanding of proper legal and constitutional order.

The meeting of the second criterion—the obtainment or restoration of statehood by a more or less autonomous region or people—is more typical in the present world order, though it existed in earlier history as well. Examples of this include, at least theoretically, the present autonomy of republics in the Soviet Union and Yugoslavia, and the birth or rebirth of other European nations like Poland and Finland. Both Poland and Finland were fairly autonomous provinces of czarist Russia, and Poland was also once an independent state, as it is again. Hungary and Czechoslo-

vakia also possessed a certain degree of national autonomy when they were states within the Austro-Hungarian Empire.

The recognition and the acceptance of this criterion is a delicate matter for an international lawyer who so often must admit the dominance of political pragmatism and political (often disturbingly violent) facts over the rule of international law. Because this criterion introduces the element of at least some legal continuity into the process of national or popular self-determination, it merits close consideration. This conclusion may be logically derived from the fact that the very existence of certain autonomous rights, as accepted by the dominant state, implies the dominant state's *nolens-volens* acceptance of the specific subjectivity of that group of people and territory. If the dominant state gives some autonomous rights to its subdivision, it accepts this subdivision, at least implicitly, as a potential subject of self-determination, even if it does not admit it. In this sense, the appearance of a new independent state which was formerly an autonomous province or colony of another state, is to some extent derived from the legal status and acceptance of such a specific status. This conclusion is in line with the international legal concept of recognition of states that Lauterpacht called "the constitutive view."<sup>29</sup>

The legal validity of the claims of self-determination of such social groups and territories may be derived as well from facts of an opposite legal character. I do not mean the case where the autonomy of a part of the former state is admitted by the latter, but rather when the former has become part of the latter dominant state as a result of international misconduct by the dominant state. Aggression, occupation, annexation, or the imposition of an unequal contract by the threat of force are some examples of international misconduct which would lead to this result. But in these cases, even if the occupied territories are refused any autonomous status, the right of self-determination, though ignored by the dominant state, is derived legally not only *ipso facto* from international law, but also from the actual legal position of the dominant state that can be qualified as an aggressor.

### C. *The Problem of "Infinite Divisibility"*

One of the counter-arguments for the unrestricted and unconditional recognition of national or popular self-determination is

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29 H. LAUTERPACHT, *supra* note 1, at 38-41.

the danger of "infinite divisibility."<sup>30</sup> Buchheit states "no state, no nation, has a population so homogeneous that it cannot be subdivided into smaller groups of greater homogeneity simply by altering the standards of what constitutes a 'distinct' group."<sup>31</sup>

This divisibility, or so called "Balkanization," may in fact be the case, but after adopting the "political criteria" for self-determination this argument fails with respect to the "infiniteness" component. The number of nations and territories that may potentially obtain or restore their statehood is not, in fact, infinite; rather, it may be predicted with some precision. The nations eligible include once occupied territories that may wish to return or rejoin their former motherlands (it is possible that Moldavia in the USSR will want to "self-determine" herself as a part of Romania); territories that may wish to raise their political status (Puerto Rico, for instance, to become a state in the U.S., or the autonomous republics in the U.S.S.R. to become full-scale republics); and subjects to federations (I mean real federations with some rights of political autonomy as was the case in the pre-Civil War U.S.) that may wish to obtain or restore their independent statehood (Baltic states in U.S.S.R., and Slovenia and Croatia in Yugoslavia).

If we count all these instances, we will determine the maximum number of states subject to potential division. The political realities, including the lack of political distinction, in many of these cases further decreases this number. The criterion of "political distinction" raises a critical point in those cases where the dominant state is an empire with some type of totalitarian regime. In democratic federations, such problems may tend to be settled by gradual political treatment without critical outbursts. The recognition of the right of self-determination may create some possibilities for further divisibility, but this increased divisibility will not be very large or "infinite." The mechanisms worked out since the 1975 Helsinki summit by the Conference on Security and Co-oper-

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30 See L. BUCHHEIT, *supra* note 15, at 28.

31 In another passage Buchheit writes:

The world community cannot indiscriminately advocate the disintegration of all polyethnic States, because to do so would create vast confusion in the current inter-State system and might well defeat its own purpose of promoting conditions for social and economic welfare by resulting in a proliferation of tiny ethnic communities lacking an economic base of viable political structure.

*Id.* at 222.

But even here I see the considerations to be of a political character (the expediency of self-determination) rather than of a legal one (the denying of the right itself).

ation in Europe (CSCE) have created a model for peaceful settlement of such problems by international control, so that dangerous disruptions of the existing World Order can be avoided.<sup>32</sup>

## II. THE POLITICAL NATURE OF BALTIC CLAIMS

This Article will not deal with the objective grounds of the Baltics people's right of self-determination. Though these objective grounds were very important, they were covered by the fact that three Baltic states, Lithuania, Latvia and Estonia, obtained their independent statehood in 1920 and had been recognized as such by the world community. This means that they met the standards for self-determination put forward by the existing law of that time.

The purely ethnic aspects of their self-determination, though of a considerable importance for the political justification of the secessionist claims of these republics or states, were not decisive from the point of view of the theory proffered in this Article. The mass deportations and massacres carried out on the Baltic Territories in 1940-41 and at the end of the 1940s were international crimes according to articles 1 and 2 of the Convention of the Prevention and Punishment of the Crime of Genocide.<sup>33</sup> The acts aimed at the assimilation of the Baltic ethnic groups into the Soviet Union and their sovietization justified their claims for cultural and ethnic protection.<sup>34</sup> *These facts, however, did not justify their right of self-determination to the extent of restoring their statehood.*

The international legality of the Baltic claims to restore their statehood was based on the combination of two matters. First, they were and remained victims of aggression and continuing military occupation, plus they were subjects to a federation that had itself recognized the sovereignty of its constituent parts. These factors constituted the objective criterion. Second, they had clearly expressed their political will to self-determine themselves through the restoration of their independent statehood, thus meeting the subjective criterion.

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32 See Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Jan. 17, 1989, reprinted in 28 I.L.M. 527 (1989) [hereinafter Vienna Document].

33 Dec. 9, 1948, \_\_ U.S.T \_\_, T.I.A.S. No \_\_\_\_, 78 U.N.T.S. 277 (entered into force, Jan. 12, 1951; for the United States, Feb. 23, 1989).

34 The population of non-Estonians in Estonia that constituted 4.7% in 1922 has risen in the years of Soviet rule in the following way: 1959-22.3%; 1970-28.2% 1989-35.2%.

The objective criterion was strengthened by the "political distinction" aspect as well. The Soviet Union was, and still remains, a "socialist," or totalitarian, state with an administratively controlled economy, whereas the Baltic states were becoming (and desired to be) parliamentary democratic states based on market economy. As mentioned previously, this real political distinction was intentionally camouflaged by official Soviet propaganda that has sometimes influenced Western attitudes towards the popular movements in the Baltic states, particularly in the early stages of those movements.<sup>35</sup>

The correct view was presented in the report given in *The New York Times* on February 9, 1991:

In an intensifying propaganda barrage over state television, Moscow has tried to present the confrontation in Lithuania as pitting "nationalist totalitarianism" against ethnic minorities. But the lines are not so neatly drawn. Immediately across the river from the barricaded Parliament stands a Russian Orthodox Church where, during the regular morning service last Sunday, Father Pyotr Muller preached a fiery sermon urging his congregation to vote "yes" with the Lithuanians.

About five parishioners walked out, and that, Father Muller said later in the week, is about the proportion of the settled Russians—as compared to soldiers and recent arrivals—who will either boycott or vote no. His parishioners, he says, are Russians who have lived here for decades, and they are as sick of Soviet power as he is. His father and his uncle perished under Stalin.

"As long as the Communist Party is clinging to power in the Soviet Union, we should leave the union," he said in a booming voice. "Nobody here mistreats the Russians. That's all clearly a provocation of the Communists; they want to create an artificial tension."<sup>36</sup>

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35 It is worth mentioning that this criteria of "political distinction" between the Baltic states and Moscow remains sound even after the collapse of the Communist regime in August 1991. After the coup, the distinction took another shape: the Baltic states continued to move toward restoring parliamentary regimes while Russia started to turn toward another type of political regime—conditionally labelled "enlightened despotism." See Shanglin & Corwin, *The Old Face of Russia*, U.S. NEWS AND WORLD REPORT, Nov. 11, 1991, at 48-49. Although the distinction may presently seem unclear (the regimes in the Baltic states in the late 1930s included some evident elements of authoritarianism), it still can be said that the political regimes now in existence in the Baltic states and Russia are too different to be combined in one state.

36 Schmemmann, *Shadow of Moscow Darkens Lithuania Independence Vote*, N.Y. Times, Feb. 9, 1991, at 2, col. 2.



The multi-ethnic composition of the secessionist movement is proof of the movement's political character. Though the Lithuanians protected their ethnic interests through their status as an independent republic, they wanted to obtain their status as a nation, that is as a political unit, thereby consolidating and expressing the interest of other ethnic groups.

The nonethnic and nonreligious character of the differences between the Baltic states and the U.S.S.R. was further proven by a paradoxical instance. Contrary to the position of Father Muller (shared by the Russian Orthodox Archbishop of Lithuania, Khristostom), the patriarch of Russian Orthodox Church, Alexsy II, signed, along with the higher commanders of the Soviet Army, a joint statement demanding that the President of the U.S.S.R. use "all means at [his] disposal" to "introduce the martial law and direct Presidential rule" in the Baltic states and some other regions of the Soviet Union.

The decisive legal fact justifying the Baltic states' radical claims for self-determination, including the right of secession from the Soviet Union, was the Soviet Union's aggression against the Baltic states in 1940 and its continuing occupation of the Baltics thereafter.

#### *A. The Legal Relations Between the U.S.S.R. and Baltic States in 1940*

The fatal course of events beginning in 1940 for the Baltic states is well-known and requires mention of only some basic features.<sup>37</sup>

The Baltic states—Lithuania, Latvia and Estonia, (parts of the old Russian Empire)—gained their independence from Russia in 1920. Russia recognized their independence through a set of bilateral peace treaties. The Treaty of Peace between Estonia and Russia,<sup>38</sup> signed February 2, 1920, in article 2 states:

On the basis of the right of all peoples freely to decide their own destinies, and even to separate themselves completely from the State of which they form part, a right proclaimed by the Federal Socialist Republic of Soviet Russia, Russia unreservedly

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<sup>37</sup> See Note, *The Annexation of the Baltic States and Its Effects on the Development of Law Prohibiting Forcible Seizure of Territory*, 6 N.Y.U. J. INT'L & COMP. L. 301 (1985). The official study of the Baltic case was carried out by the so-called Kersten's Committee of U.S. Congress in 1954 and is presented in 3-volume document: *Hearings Before the Select Committee on Communist Aggression*. H. Rept., 83d Cong. 2d Sess., (1954).

<sup>38</sup> Feb. 2, 1920, Estonia-Russia, 11 L.N.T.S. 51.

recognizes the independence and autonomy of the State of Estonia, and renounces voluntarily and forever all rights of sovereignty formerly held by Russia over the Estonian people and territory by virtue of the former legal situation, and by virtue of international treaties, which, in respect of such rights, shall henceforth lose their force.<sup>39</sup>

Russian treaties with Latvia, signed August 11, 1920, and Lithuania, signed July 12, 1920, contain similar clauses. The treaties also included the recognition by Russia of the internationally provided neutrality of the Baltic states. From a purely legal standpoint, these treaties meant the transition of "sovereignty" from a former dominant state to new independent states. The Baltic states' acquisition of sovereignty was not only a matter of fact, but it also met the most rigid legal criteria. Two years later in 1922, the Baltic states were admitted as full-scale members to the League of Nations. The Soviet Union joined the League of Nations in 1934 and was expelled from it in 1939 because of its aggression against Finland. Therefore, between 1934 and 1939 the relations between the Baltic states and the Soviet Union were bound by the Charter of the League of Nations. Bilateral relations between the Baltic states and the Soviet Union are also evidenced in several treaties.<sup>40</sup>

The Baltic states were also legally related to the Soviet Union through a number of multilateral legal documents. These included the Convention for the Definition of Aggression (or the so-called Litvinov Convention of July 3, 1933),<sup>41</sup> Treaty of Paris of 1928<sup>42</sup>

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39 *Id.* at art. 2.

40 Pact of Mutual Assistance Between the Republic of Latvia and the Union of Soviet Socialist Republics, Oct. 5, 1939, Latvia-U.S.S.R., 198 L.N.T.S. 381; Pact of Mutual Assistance Between the Republic of Estonia and the Union of Soviet Socialist Republics, Sept. 28, 1939, Estonia-U.S.S.R., 198 L.N.T.S. 227; Convention Relating to Conciliation Procedure Between Latvia and the Union of Soviet Socialist Republics, June 18, 1932, Latvia-U.S.S.R., 148 L.N.T.S. 129; Convention Between Lithuania and the Union of Soviet Socialist Republics for the Definition of Aggression, July 5, 1933, 148 L.N.T.S. 79; Conciliation Convention Between Estonia and the Union of Soviet Socialist Republics, June 16, 1932, Estonia-U.S.S.R., 131 L.N.T.S. 309; Treaty of Non-Aggression and Peaceful Settlement of Disputes Between Estonia and the Union of Soviet Socialist Republics, May 4, 1932, Estonia-U.S.S.R., 131 L.N.T.S. 297; Treaty of Non-Aggression Between the Republic of Lithuania and the Union of Soviet Socialist Republics, Sept. 28, 1926, Lithuania-U.S.S.R., 60 L.N.T.S. 145. None of these documents had expiration dates before Dec. 31, 1945.

41 July 3, 1933, 147 L.N.T.S. 69 [hereinafter Litvinov Convention].

42 Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57 (*entered into force*, July 24,

and the Convention on the Rights and Duties of States (or so called Montevideo Convention of December 26, 1934).<sup>43</sup> Although the U.S.S.R. was not a signatory to the Montevideo Convention, the Convention was considered to be a part of *jus cogens* of the time. These documents show that the relations between the Soviet Union and the Baltic states were regulated by a solid set of internationally and legally binding acts.

Although it lacks any specific legal significance, the Decree on Peace of 1917 deserves mentioning at this point.<sup>44</sup> Soviet Russia, in the Decree written by Lenin, unilaterally declared and adopted during the Second Congress of Soviets its own definition of annexation. It stated:

If any people are held by force in defiance of its expressed wish, are not given the right of decision, free from every duress, by free elections, without the presence of those armed forces of the incorporating state or any more powerful state, of what form of national existence it wishes to have then the incorporation of such a state should be called annexation, an act of seizure and force.<sup>45</sup>

The Soviet Union breached all of these documents, however, in June 1940, by their violent aggression against and subsequent occupation of the Baltic states. There is no need to present an analysis to prove this conclusion, as it has already been analyzed by hundreds of scholars. It is enough to mention that this legal qualification—that the U.S.S.R.'s actions in 1940 and thereafter amounted to aggression and occupation—was also officially adopted by the supreme legislatures of the Baltic Republics in their official resolutions in 1989-1990. The constitutional documents imposed on Baltic governments by Soviet force and issued by the puppet regimes in 1940 were declared to be legally invalid and the legal goal of them could be characterized as *restitutio in integrum*.<sup>46</sup> Based on these considerations and the will of the Baltic

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1929). The treaty, popularly known as the Briand-Kellogg Pact, designed a framework for the peaceful settlement "of all disputes and conflicts."

43 Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (*entered into force*, Dec. 26, 1934) [hereinafter Montevideo Convention].

44 Decree of Peace, Nov. 8, 1917 (Russian text available from the author); for an English translation, see Note, *supra* note 37, at 411.

45 *Id.*

46 See, e.g., Declaration Regarding Mandate of U.S.S.R. President Mikhail Gorbachev during the Upcoming Summit with U.S. President George Bush, beginning May 30, 1990, in Washington, D.C., signed May 26, 1990, by Foreign Affairs Ministers of Estonia, Latvia, and Lithuania.

peoples, the Baltic states declared their independence. Lithuania declared its independence *de jure*, and Estonia and Latvia declared a transitional period in which to restore their independence.

But here we have already run ahead of the events.

### *B. Does Aggression Expire?*

The Baltic states were occupied in 1940, and it is now 1991. From the justification of the Baltic states' claims for the restoration of their independence, the question arises whether the internationally unlawful acts of aggression and occupation have any term of expiration. Or in other words, does the justification for national self-determination in this case also include the fact of being the victim of an aggression and occupation or does this fact, overtime, lose its significance?

International law does not provide a clear answer to this question. Neither the Litvinov Convention of 1933<sup>47</sup> nor its modern successor, the United Nations Resolution on the Definition of Aggression,<sup>48</sup> gives any firm answer. Nevertheless, it seems that these basic documents tend to interpret the temporal dimension of aggression in a fairly broad way. The Litvinov Convention stated that the act of aggression can "never" be legitimate,<sup>49</sup> and the modern resolution includes a more profound rule. Article 7 of the Resolution states:

Nothing in this Definition . . . could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.<sup>50</sup>

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<sup>47</sup> See Litvinov Convention, *supra* note 41.

<sup>48</sup> G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975), reprinted in 13 I.L.M. 710 [hereinafter *Definition of Aggression*].

<sup>49</sup> See Litvinov Convention, *supra* note 41.

<sup>50</sup> *Definition of Aggression*, *supra* note 48, at art. 7.

Without further considerations, it can be stated that the texts of modern international law do not reject the interpretation that aggression is an unlawful act without any term of expiration. At the same time, it is evident that such an unrestricted position is vulnerable to the argument of *reductio ad absurdum*. It is hard to believe that the aggressions and remaining consequences of the actions of William the Conqueror, Eric the Red, or even the more "recent" conquests by Peter the Great can be contested by the means of modern international law and in the framework of modern World Order. (Though one has to admit that some modern territorial disputes unfortunately do refer back to the historical events of centuries ago!) The question of the practical applicability of this principle, therefore, still remains.

The solution may lie in the framework of the general theory of recognition. The idea of "eternal" nonrecognition of the results acquired through aggression is based on the principle *ex iniuria ius non oritur* (legal rights will not arise from wrongdoing). The principle itself is adequate, but rigid application of it creates certain difficulties. The fact is that certain acquisitions of new territories remain intact *de facto* and sooner or later must be recognized as such by the world community. Initially illegal, they become part of the international territorial structure, and through gradually increasing recognition, they obtain in the long-run recognized, legal title as well. As a matter of fact, the unlawfulness of a given aggression tends to expire. That is, unfortunately, the hope of all aggressors.

Though I am unable to determine what the exact term of expiration is, there may be more or less distinct temporal instances when this actual expiration starts. For practical reasons, it may be admitted that this term starts after considerable resistance to the occupation ceases to exist or—from the international point of view—when the fact of an occupation of territory in question ceases to be of international political interest or concern.

This principle is referred to as the "presumption in favor of established governments."<sup>51</sup> Though Lauterpacht, for instance, related its applicability to the sphere of the revolutionary situation, this principle also seems to apply in the case of aggression and a long-term occupation. The *de jure* recognition of the former government lasts until, as Lauterpacht states, "the lawful government offers resistance which is not ostensibly hopeless or purely nomi-

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51 H. LAUTERPACHT, *supra* note 1, at 94.

nal.<sup>52</sup> The recognition, in fact, tends to be prolonged also if the appearance of a new government (a puppet regime) has been unlawful or resulted from international wrongdoing (aggression).

Once again I must admit that this proposition—that aggression may expire—cannot be accepted as morally or even legally valid, but, unfortunately, we have to accept it as a fact of international policy.

### C. *The Resistance to Occupation*

The regular troops of the Baltic states did not actually militarily resist the Soviet Army's invasion in 1940. The strength of the forces were too unequal. By 1940, the number of Soviet troops located on the territory of Estonia was seven times as great as the regular army of Estonia. The situation was the same in Latvia and Lithuania. In 1940 and 1941, and even more so after World War II, instances of anti-Soviet guerrilla warfare can be traced, however. While under the Nazi-German occupation in 1941-44, the resistance movements of formerly independent Lithuania, Latvia, and Estonia managed to form underground governmental bodies (National Committee in Estonia, Central Committee in Latvia and Supreme Committee for the Liberation in Lithuania)<sup>53</sup> aimed at restoring the independence of the Baltic states. Steps were also taken according to the constitutions of those states to preserve the legality of these bodies to guarantee the legal continuity of their existence.<sup>54</sup> Though these efforts failed, and the Nazi-German occupation was immediately followed by Soviet occupation, their existence in the first place is proof of the political resistance against these occupations.

The armed guerilla-warfare against the Soviet rule which took place after the World War II is further proof of resistance. This fact was very important for the legitimization of the Baltic states' "secessionist" claims for national self-determination. The guerilla-warfare was evidently not an ethnic struggle for ethnic rights, but a military and *political* action justifying the modern claims for the restoration of independent national statehood and for the prolongation of the expiration term of the Soviet occupation.

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52 *Id.*

53 See Note, *supra* note 37, at 386.

54 Dr. Yuri Pyld of Tartu University has analyzed this subject extensively.

The fact that the Soviet Union has never recognized these guerrilla fighters as the soldiers of belligerent parties and POWs is also worth noting. By treating them as criminals (the official Soviet term for guerrilla units was "bandit formations"), the Soviet Union committed an international crime, violating the Hague Convention on land warfare<sup>55</sup> and even the principles of the Agreement for the Prosecution and Punishment of Major War Criminals.<sup>56</sup> Although it lacks retroactive legal power, it is worth mentioning that the Geneva Convention Relative to the Treatment of Prisoners of War defines "prisoners of war" in part as the "members . . . of organized resistance movements."<sup>57</sup> Furthermore, though the guerrilla war in the Baltic states was almost over by the time of the signing of the Geneva Convention and many guerrilla-fighters had already been executed without a trial, many of them were still serving their terms in Soviet concentration camps even though the Soviet Union had already signed the Geneva Convention on August 12, 1949.<sup>58</sup>

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55 Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 205 Parry's T.S. 277 (*entered into force*, Jan. 26 1910).

56 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. Article 6 of the Agreement, the so-called "Nuremberg Charter" applies conditionally to this case. The "Nuremberg Charter" was aimed at the punishment of the authorities of the "European Axis Powers," but the principles set forth by this Act are of greater international significance.

57 Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (*entered into force*, Oct. 21, 1950; for the United States, Feb. 2, 1956) [hereinafter Geneva Convention].

58 The U.S.S.R. also violated other international legal principles at that time. By mass deportations of civilians (at least 350 thousand from Lithuania alone!), the Soviet Union violated the Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (*entered into force*, Oct. 21, 1950; for the United States, Feb. 2, 1956) and committed the crime of genocide.

The U.S.S.R. violated international law (international criminal law included) on other occasions by its nonrecognition of the Baltic states (or in Soviet terminology: "Soviet Socialist Republics") as occupied territories. Although these incidents are politically significant (for instance, the mass refusal of Baltic citizens to serve in the Soviet army was justified by article 51 of the Geneva Convention, *see supra* note 57) as additional motives for the secessionist movements in the Baltic states, they are almost irrelevant to the theoretical purposes of this Article.

Nevertheless one terminological specification must be given here. The term "secession" is not precisely the correct term because it is impossible to secede from a Union one has never joined. It is more precise to speak about the restoration of independence by an occupied state. Only with these reservations in mind is the term "secession" used in this Article.

The term of expiration for the Soviet aggression and occupation of the Baltic states also had been extended by the fact that the occupation had constantly remained a matter of international concern. The continuing recognition of diplomatic and consular representations of the Baltic states in exile and the policy of the nonrecognition of Soviet puppet regimes on the Baltic territories manifested this continual international concern.

#### *D. The "New Renaissance"*

Until 1988, the situation in the Baltic states was fairly stable, and we cannot trace any evidence of considerable legal impact there. Some minor groups that tried to express their resistance to the existing regime were unable to change the actual legal situation in the Baltic states. The situation changed in the fall of 1988 when the mass popular political movements (popular fronts) appeared. Though not particularly clear in their initial statements, they still must be considered to be massive political opposition of international legal importance.

After the transition of state power to these former opposition groups (the transition was in whole accordance with Soviet law), some steps of international legal importance were made. On March 11, 1990, the Supreme Council of Lithuania declared the independence of Lithuania to be restored *de jure*, and the supreme legislative bodies of Latvia and Estonia initiated transitional periods with the goal of restoring the independence of these republics or states. These acts were not of an ethnic, but of a national self-determinative character. After these legal motions, the occupational character of the Soviet Union's presence in the Baltic territories, somewhat implicit and habitual during last decades, again became legally evident.

Though the legal status of the Baltic states had become legally equivocal since the very beginning of their occupation, it was not a sound legal problem for the world community for many years. The *de jure* Baltic states, represented by governmental, diplomatic, and consular offices in exile, and the *de facto* republics on the Baltic territories existed in different worlds without any legal or even political influences upon each other. The above-mentioned equivocality, therefore, existed in theory rather than in reality.

The situation changed after the transition of power because the new legislatures in the Baltic states were, for the first time since the Soviet aggression, elected in a democratic way. They



were representative bodies which expressed their political opposition to the Soviet dominance over their territories.

The qualification of the Baltic states' international legal status under the still valid Montevideo Convention remained controversial. According to article 2 of that text, "the federal state shall constitute a sole person in the eyes of international law,"<sup>59</sup> and the Soviet Union's official position had always been that the Baltic states, after they had "voluntarily joined" the U.S.S.R., had become constituent parts of the Soviet Union.<sup>60</sup>

Nonetheless, the legislatures of the Baltic republics, which were recognized by the Soviet Union, undertook steps aimed at the restoration of their sovereignty and independence. And though these new legislatures and governments were not recognized *de jure* as the bodies of independent states, the same Montevideo Convention nevertheless provided them some international legal personality in article 3. The text states:

The political existence of the state is independent of the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no limitation that the exercise of the rights of other states according to international law.<sup>61</sup>

It may be assumed, therefore, that the actions taken by the U.S.S.R. *after* the declaration of independence (Lithuania) or the declaration of a transitional period aimed at restoration (Latvia, Estonia) can be qualified to some extent as actions made with respect to international legal standards of interstate and intergovernmental behavior.

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59 Montevideo Convention, *supra* note 43, at art. 2.

60 This firm stand of Soviet policy was weakened to some extent by the admission of the Soviet Union of the existence of the confidential protocol to the Nazi-Soviet pact of Aug. 23, 1939 that formed the political grounds for the Soviet aggression of 1940. The official admission was made by the Second Congress of Peoples' Deputies of the U.S.S.R. in Dec. 1989.

61 Montevideo Convention, *supra* note 43, at art. 3. It goes without saying that according to international law, the U.S.S.R. did not have any rights over the Baltic states. Article 5(3) of the Resolution on the Definition of Aggression states: "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful." *Definition of Aggression*, *supra* note 48, at art. 5(3).

The Soviet Union had tried to avoid this situation by propagandistic statements that the newly-elected parliaments and non-communist governments nominated by these parliaments did not adequately express the will of their nations. The overwhelming support for the independence of Lithuania shown by the referendum of February 9, 1991, proved the groundlessness of such statements made by Gorbachev (who himself has never passed the test of popular voting—neither as a deputy for the seat guaranteed to the Communist Party, nor as the President of the Soviet Union).

It seems to me that from the international legal point of view, a referendum is not an absolutely necessary condition for the right of national self-determination to be exercised in a proper way. The International Court of Justice, in the already mentioned *Western Sahara* case, admitted that the General Assembly of the U.N. retained a considerable "measure of discretion with respect to the . . . procedure" by which the right for self-determination is to be realized.<sup>62</sup> Technically, even Soviet Russia itself in the Decree on Peace admitted the adequacy of different forms of expression of the will for self-determination up to the obtainment of independent statehood. The allowable forms include press publications, programs of political parties. Furthermore, the Soviet Union had never contested the constitutionality and legality of these newly-elected state bodies in the Baltic states.

From this perspective, the actions taken by the U.S.S.R. against the Baltic states in 1989-90 should not be viewed as actions of the internal affairs of the Soviet Union. However, in January 1991, Gorbachev labeled the concern of European and North American States over the events in Lithuania and Latvia as an interference in Soviet internal affairs. Nonetheless, the events that once might have looked like instances of internal disorder or misconduct acquire a principally different legal status now.

### *E. The International Legal Consequences*

The first instance of renewed Soviet aggression against the Baltic states was the economic blockade imposed on Lithuania after it adopted its declaration of independence.<sup>63</sup> This act may have qualified as a violation of article 1 of the Declaration on the

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62 See HANNUM, *supra* note 20, at 38.

63 The blockade was, by the way, a violation of the Soviet municipal law; namely the Declaration of the Second Congress of Peoples' Deputies of Dec. 24, 1989, which condemned all kinds of blockades aimed at the achievement of political goals.

Inadmissability of Intervention,<sup>64</sup> adopted December 21, 1965, which states that "[n]o state has the right [to use] . . . attempted threats against . . . economic . . . elements" of any other state. Under the Resolution on the Definition of Aggression, "the blockade of the ports or coasts of a State by the armed forces of another State"<sup>65</sup> is an act of aggression. Therefore, these actions were a continuation of the Soviet Union's aggression against Lithuania which had begun in 1940.

This Soviet blockade against Lithuania included another legal problem. Some parallels exist between this blockade and the naval blockade used by the Union government against the Confederate states during the American Civil War. The American blockade was recognized by foreign governments like Great Britain as a legally valid action of the lawful government. The Lithuanian blockade was in some respects similar. In both cases, the blockade was introduced by an internationally recognized government, nor was it violated by third parties. This respect by third parties of the blockade could be interpreted as the *de facto* lack of recognition of both the Southern Confederacy and Lithuania. But there is one principal difference between these cases. The sovereignty of the U.S. government was recognized for the whole territory of the United States, southern states *included*, while the sovereignty of the U.S.S.R. has not been recognized over its entire territory, including the Baltic states. The nonviolation of the Lithuanian blockade was, therefore, a matter of political realities and not the abandonment of the long-standing policy of nonrecognition.

If one accepts the existence of the Lithuanian state *de jure* after its declaration of independence according to article 3 of the Montevideo Convention, then the whole set of events in Lithuania in January 1991, including the military actions and the creation of the shadowy pro-Soviet National Salvation Committees, must be viewed as a violation of article 2 of the 1965 Declaration on the Inadmissability of Intervention. Article 2 states: "No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of

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64 *Declaration on the Inadmissability of Intervention in the Domestic Affairs of the States and the Protection of their Independence and Sovereignty*, G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) 11, U.N. Doc. A/6014, (1966), reprinted in 5 I.L.M. 374 [hereinafter *Declaration on the Inadmissability of Intervention*].

65 *Definition of Aggression*, *supra* note 48, at art. 3(c).

the regime of another State, or interfere in civil strife in another State.<sup>66</sup>

These examples of the Soviet Union's breach of law may be easily multiplied, but they all have a common feature. To some extent, the international crimes committed by the U.S.S.R. against the Baltic states resulted from the fact that the Soviet Union still refused to recognize its former aggression and continuing occupation of the Baltic states.<sup>67</sup> The irony of international law is that it practically and even legally tolerates its most extreme and cynical violations. The aggressor or the occupying state may be condemned if the state admits the facts of aggression and occupation, but its condemnation is much more difficult in more extreme cases in which even those facts, or at least the legal qualifications, are simply denied.

#### *F. Implicit Recognition by the U.S.S.R.*

At the same time, it may be said that some instances of Soviet policy (not to mention the acts of genocide and the imposed migration to the Baltic states) implicitly prove that in some specific cases the Soviet Union itself had admitted the continuous legal status of the Baltic states. These admissions occurred despite the fact that the Baltic states were technically and de facto an integral part of the U.S.S.R. as a whole.

On August 23, 1944, the Presidium of the Supreme Soviet of the U.S.S.R. issued a decree concerning the transfer of certain territories of South-Eastern Estonia to neighboring Russia. Although the Soviet Constitution requires changes to the territory of republics to be approved by the consent of the republics involved, this formality was not followed. On January 18, 1945, only a half a year later, the Presidium of the Supreme Soviet of the Estonian S.S.R. admitted the liquidation of a corresponding administrative-territorial unit of the republic.<sup>68</sup> This action is inexplicable in terms of the Soviet law itself and is quite strange with respect to the careless rush in which it was carried out. Why make such changes in the territorial boundaries at all if, after the "friendly" joining of Estonia into the U.S.S.R., there would be republics that

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66 *Declaration on the Inadmissibility of Intervention*, *supra* note 64, at art. 2.

67 Even later when the U.S.S.R. finally *did* recognize the Baltic states' independence, the official statement on Sept. 6, 1991 made only a vague reference to "historical circumstances" and did not provide any legal evaluation.

68 Dr. Heiki Lindpere has studied the legal aspects of this event.

were part of the same federation on the both sides of the former state border? Both sides would have the same political and social qualities; both would be states of "workers and peasants" and share even the same ideological doctrine and "infinite love" towards the great Stalin. What difference does the transition of territory make? These questions disappear once we admit that this action was not based on the official statements of Soviet propaganda and law, but rather on the implicit assumption that for some time at least Estonia remained an occupied territory of a foreign country. The political task of the Soviet Union was to obtain as many advantages from this aggression as possible. This assumption was never articulated or admitted in public, but was nevertheless implicitly assumed.

Jumping over the intervening four decades, we can provide some more instances of similar political and legal significance. After Lithuania's declaration of independence on March 11, 1990, Lithuania has been, in fact, accused of violating the Soviet Constitution even though at that time that Constitution no longer legally bound Lithuania, even if it did before as an act of an occupational regime. Lithuania also had been referred to as the Soviet Socialist Republic or the S.S.R., in verbal statements of the federal government. Nevertheless, the Soviet Union had implicitly admitted the absence of Lithuanian deputies from the third and fourth Congresses of Peoples Deputies and from the Supreme Soviet of the U.S.S.R. Without any meaningful settlement or even any settlement attempts, the Soviet Union had implicitly admitted that Soviet legislation may be imposed on Lithuania without its formal participation in the legislation's promulgation. This admission did not fit into the concept of the Baltic states as "Soviet Republics," but was explicable as an effort by the Soviet Union to impose Soviet legislation upon a country that was not part of the Soviet federation.<sup>69</sup>

In contrast to these instances of implicit recognition of the specific legal status of Baltic states, the Soviet Union, whose constitution admits the right of its republics to secede from the Union, still insisted that the Baltic states' secession from the Union be in

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69 On April 28, 1990, the Supreme Soviet was forced to accept the Baltic proposal, the so-called "quorum clause," that to some extent legalized their absenteeism because of problems with its own quorum (all the deputies of Lithuania and most from Estonia and Latvia had left.). It states that if a deputy or a group of deputies declares it impossible to participate in the process of adopting a law, they are excluded from the quorum on this particular issue.

accord with the patterns of Soviet law. The Soviet Union insisted on this despite the fact that Soviet law was imposed on the Baltic states by political and military might and was derived from the actual occupation of these states.

### G. *The Soviet Law on Secession*

This Article is not the proper place to discuss U.S.S.R. law dealing with the mechanisms of secession of republics from the Soviet Union which was passed by the Supreme Soviet on April 3, 1990. When that law was passed, Lithuania's deputies were absent *in corpore*, and the majority of Latvian and Estonian deputies also were not participating. Instead, it is enough to say that the law is technically void and even principally nonrealizable as was proved by the analysis of Baltic officials and jurists.<sup>70</sup> From a political point of view, this law lost all of its value, including its propaganda value after the collapse of the Soviet federation as a result of the failed coup in August, 1991. I will emphasize here only a few aspects that are, or rather were, relevant from the international legal point of view.

First, the application of this law to the Baltic states was problematic in itself. People and territories that have never joined the union and remain under alien occupation cannot secede from that union, anymore than they can secede by following the rules imposed upon them by that union without their own consent.<sup>71</sup> The Baltic states' acceptance of the terms of the federal law on secession would imply a recognition of the legal authority of the Soviet Union over the Baltic territories, and could mean even some *ex post facto* legitimization of the more than four decades of Soviet rule in Lithuania, Latvia, and Estonia.

This danger of implicit acceptance was why the referendum carried out in Lithuania on February 9, 1991, was cautiously referred to by Lithuanian officials as a "poll of public opinion" or, later, as a "plebiscite" for the amendment of the Lithuanian con-

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<sup>70</sup> The Baltic Press published analytic experts of different law societies and lawyer associations.

<sup>71</sup> Naturally, no referendums were held in 1940 in the Baltics on whether to join the U.S.S.R. The problem of plebiscites on the self-determination of the Baltic peoples in the post-war period was slightly touched by Roosevelt and Churchill during their summit-meetings with Stalin in Teheran and Yalta, but the leaders of the U.S.A. and the U.K. never obtained an answer to that question from the U.S.S.R.

stitution.<sup>72</sup> This referendum, undeniably, was not meant as fulfillment of the demands of the Soviet law on secession.

The Soviet law which formally provided the republics with the mechanism of secession—the right for secession itself is guaranteed by the article 72 of the Soviet Constitution—embodied principal breaches of international law as well. In such cases, the modern *jus cogens* demands the observation of voting and the counting of votes by neutral international observers. This possibility is not excluded by the Soviet law, but this law includes a very substantial admission. According to section 5 of the law, foreign observers (only from the U.N.) are admitted only if the Supreme Soviet of the U.S.S.R. “considers this to be needed.” The legally elected representative bodies of the republics do not have any input on this question.

From the international legal point of view, what the law does not say is more important than what it does say. Most notably, the presence of the Soviet troops (like in the Baltic territories) was not mentioned. The latest proceedings in the Baltic states proved that their presence in the Baltic states was not as innocent from the internal point of view as it might seem. Commenting on the behavior of the Soviet troops in Lithuania, President V.

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72 In Latvia, the plebiscite on March 3, 1991 was called an “Advisory Vote.” Technically the question put to the vote in Lithuania was whether to include in the Constitution of Lithuania the following statement: “Lithuania is an independent democratic republic.”

This may be compared to the question put to the vote on the federal referendum of March 17, 1991 that did not include any reference to the possibility of leaving the Union at all, although formally it was designed by the Soviet peoples for the Soviet peoples to exercise the right for self-determination by the Soviet peoples. The question for that referendum was: “Do you think it necessary to preserve the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics, in which the rights and freedoms of the people of all nationalities will be fully guaranteed?”

I do not want to critique the style of the question that presents an example of poetry rather than of a legal test, but the proposed question includes at least three issues: (1) Whether to preserve the Union or not; (2) Whether it must be a renewed federation; (3) Whether it must be a federation of “sovereign” republics.

At the same time, the position of Lithuania excluded the possibility to void the former decisions of the Lithuanian parliament (especially, the Declaration of Independence) of legality as the valid acts for self-determination. In the resolution addressed to the international community, passed after the plebiscite, the Supreme Council of Lithuania urged only “to take into account the results of the plebiscite held on the 9 February 1991” and viewed the results as the “confirmation” of the former acts of the newly elected Parliament. This is a direct counterclaim to the Soviet Union’s stand that only a referendum carried out according to the Soviet rules may be considered as legally valid. (In 1940, the Soviet position was different: their unanimous “yes” vote by the puppet parliament was absolutely satisfactory for the justification of Soviet occupation.).

Landsbergis simply stated that they resemble "the mob of bandits" rather than a disciplined army. In fact, the Fourth Congress of Peoples' Deputies refused to adopt an act prohibiting the involvement of the army in internal affairs. This refusal began the process of parliamentary suicide that was completed by the Communist junta in August 1991. The number of Soviet troops in Baltic territory was very considerable, and under the Soviet law on secession, these troops were not unequivocally excluded from the electorate of the referendum on self-determination. It might be assumed that the majority of servicemen who do not have any connections with the Baltic states tend to vote in favor of federal Soviet authorities. In comparison, article 4 of the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>73</sup> states: "All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected."<sup>74</sup>

The question of the applicability of this act in the Baltic case must be answered next. The Declaration was aimed at decolonization and not at the procedure of national self-determination in general. But the Act may still apply to the Baltic case. First, the Declaration's preamble states its applicability to cases of "all dependent peoples," and the peoples of the Baltic states were dependent in this sense. Second, colonial dependency and occupation as a victim of aggression are not phenomena that exclude each other. Moreover, colonization may appear as the result of a successful aggression.<sup>75</sup>

The principle of the inadmissibility of foreign interference into the process of self-determination was reconfirmed by the concluding document of the Vienna meeting of the CSCE in 1986. Article 4 of that document states: "All peoples always have the

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<sup>73</sup> Declaration on Decolonization, *supra* note 3.

<sup>74</sup> *Id.* at art. 4.

<sup>75</sup> The history of international law has a rule known as "salt-water-test," that meant the separation of international law applicable for the dominion-states and that for the colonies, i.e. territories that are separated from the colonial dominions by "salt water"—oceans and seas. It was based on the assumption that territories out of Europe are *terra nullius*—nobody's lands,— and the sovereignty there may be instituted by their mere seizure and effective administration. Not only the modern political realities and ethical principals but the very fact of the adoption of the Declaration on Decolonization, *supra* note 3, serves as a proof that this test is not a valid part of international law anymore.



right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."<sup>76</sup>

Therefore, even if the law on secession of the Soviet Union was in principle valid, and even if it applied to the Baltic states, it still breached international law. With this in mind, the results of the referendum in Lithuania appeared to be even more sound given the very unfavorable conditions for the free expression of the popular will of the nation of Lithuania.<sup>77</sup>

#### *H. The Problems of International Recognition*

The problems connected with the actual and legal status of the Baltic states still remained unsolved until the course of events unexpectedly accelerated as a result of the events following the failed coup of August 1991. Their governments were still neither explicitly recognized *de facto* nor *de jure* as the governments of independent states. Their officials and diplomatic envoys had been received by the foreign governments only as private persons by the Western States or as officials of Soviet bodies by the Soviet Union. The first signs of possible recognition did appear in the first months of 1991. Several countries such as Poland, Hungary, Denmark, and Iceland, had expressed their readiness to install interparliamentary links with the Supreme Councils or Supreme Soviets of the Baltic states. This step might be interpreted as the recognition of the Supreme Councils as adequate representations of these people. The pioneering role belonged to tiny Iceland who, on February 11, 1991, made the first official proposal to Lithuania to initiate talks concerning establishing diplomatic relations "as soon as possible." Denmark had also played a very active role in obtaining the CSCE's support for the Baltic states. The Danish parliament's proposal to organize an international conference on the Baltic question later obtained support from the Nordic Council. Other countries have installed other forms of permanent political contacts with the Baltics, but the problem of more mature recognition still remained until late August 1991, when the Baltic states' legal and political problems were solved and in Sep-

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<sup>76</sup> Vienna Document, *supra* note 32, at art. 4.

<sup>77</sup> The official results were: Percent of the eligible voters who actually voted (from their total number)—84.52; voted "yes"—90.42% "Yes" votes percent from the whole number of eligible voters: 76.78.

tember 1991, when the Baltic states obtained their status as full-scale members of the United Nations, recognized by tens of countries including the U.S.S.R. and the United States. It is worth mentioning that during the coup of August 19-21, 1991, the differences in legal status between Lithuania and Estonia and Latvia disappeared. Facing the threat of direct military actions by the junta, both Latvia and Estonia declared their independence and ended the former transitional period.

Besides the necessity of acquiring diplomatic relations with other countries before August 1991, other options could be explored. First, recognition could have been sought from the International Court of Justice. Though this organization is a specialized branch of the U.N., and the Baltic states were not members according to United Nations article 35, the Statute of the Court admits states that are not members of the United Nations as parties in cases dealt with by the Court. Under the provision of article 34, the requirement of statehood for parties in cases within the jurisdiction of the court was met by the Baltic states even according to the Soviet Constitution which in article 76 defines each Soviet republic as a "sovereign socialist state."<sup>78</sup> The jurisdiction of the International Court covered the Baltic case due to article 37 of its Statute. This Article recognizes the validity of the acts of the League of Nations of which the Baltic states were once members.

The main obstacle for this option was the fact that the Soviet Union as a respondent in such a case may have simply refused to accept the international jurisdiction for such a case, considering it instead to be the internal affair of the U.S.S.R. Such a political stand had been taken by the U.S.S.R. during the Paris summit of the CSCE in November 1990, when the U.S.S.R. demanded the removal of Baltic diplomats who were invited to be present as observers. The same may be said about Soviet efforts to inspire France to oppose the EEC pro-Baltic decisions by offering France the reincarnation of the special Franco—U.S.S.R. relationship established under the Gaullist governments. The Soviet position had been explicitly manifested on February 5, 1991, during a briefing by the Soviet Foreign Ministry's spokesman, Vitaly Churkin, who said, while criticizing the position taken by Iceland, that "[t]he political dispute between the Baltic republics and the

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78 KONST, SSSR § 76.

U.S.S.R.'s authorities may not be settled on the basis of international law."<sup>79</sup> The nervousness of the Soviets over the legal and political situation in the Baltic states was, nevertheless, unwillingly revealed by a Soviet threat that if the United Nations entered into the crisis, then the situation would receive an appropriate assessment, and, if need be, even opposition from the Soviet Union. The "new thinking" so actively propagated by Gorbachev, therefore, includes some chapters of the more traditional Soviet thinking dating from 1940.

The realization of the options provided by the Hague Court presupposed continuing political and diplomatic efforts. The other option for the Baltic states was provided by the Optional Protocol to the International Covenant on Civil and Political Rights,<sup>80</sup> now recognized at least by the Soviet Union. This protocol establishes procedures and jurisdiction for claims to the Human Rights Committee against the violators of the named Covenant. If article I of the Covenant can be interpreted to grant a right of self-determination, then the Human Rights Committee should have been open to the claims of the Baltic peoples.

### CONCLUSION

This expanded discussion of the legal problems connected with the recent status of the Baltic states was based on the assumption that the right of national self-determination to the extent of obtaining or restoring their statehood is internationally recognized and is more probable in cases where traditional criteria for providing that right are complimented by political and legal arguments. The first part of this Article discussed this theoretical claim, and the case study was aimed at providing some evidence for that claim. I hope that I have managed to show, or at least lead you to see, the following:

(1) The legal problems connected with the recent status of the Baltic states resulted from their legal status as the victims of aggression and the subjects of alien occupation.

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<sup>79</sup> Kanishchev & Timofeyev, Moscow TASS, Feb. 5, 1991, *reprinted in Churkin Views Baltics, Gulf War, Other Issues*, FBIS-SOV-91-025, Feb. 6, 1991, at 1. The Soviet position can also be seen in the Soviet diplomatic demarche to the Nordic States. The demarche which warned the Nordic States against supporting Baltic independence is reported in Crona, *Secret Soviet Warning to the Nordic Countries*, Stockholm Svenska Dagbladet, Feb. 28, 1991 at 3, (in Swedish), *reprinted in Nordic Countries Warned on Baltic Interference*, FBIS-SOV-91-043, March 5, 1991, at 48-49.

<sup>80</sup> *Supra* note 3.

(2) The claims for self-determination in the form of secession from the Soviet Union (actually, the restoration of their independence is more accurate than secession) were not of purely ethnic but rather of national character. This means that the methods provided by international law for the protection of purely ethnic rights were not appropriate or sufficient in this case.

(3) The ethnic element, though present in the claims of the Baltic states, was not a principal and decisive one in this case. The ethnic natives of the Baltic states certainly acquired more reliable protection of their ethnic rights through the restoration of their independent statehood, but at the same time they served merely as the consolidating core for the Baltic nations as distinct, political entities. The rights of other ethnic groups were protected then by the democratic nature of the political regimes instituted in the Baltic states. This may cure them from the wounds caused by the tragic and dramatic past events of the Soviet regime.

